# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>April 19, 2011 |
| v | No. 297125<br>Macomb Circuit Court |
| ANTHONY WAYNE BIRD,<br><br>Defendant-Appellant. | LC No. 2009-004797-FC |

Before: DONOFRIO, P.J., and CAVANAGH and STEPHENS, JJ.

PER CURIAM.

Defendant was convicted by a jury of reckless use of a firearm, MCL 752.863a, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to 90 days in jail for the reckless use of a firearm conviction and a concurrent two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant was charged with assault with intent to commit murder, MCL 750.83, and felony-firearm. At trial, the trial court granted the prosecution's motion to add charges of assault with intent to do great bodily harm less than murder, MCL 750.84, and felonious assault, MCL 750.82, as alternative charges to assault with intent to commit murder. The court later dismissed the assault with intent to commit murder charge and, at defendant's request, instructed the jury on the additional offenses of discharging a firearm without malice, MCL 750.234, and reckless use of a firearm. The jury found defendant guilty of reckless use of a firearm, a misdemeanor, and felony-firearm.

Defendant first argues that his dual convictions for reckless use of a firearm and felony-firearm violate the double jeopardy protection against multiple punishments for the same offense. Because defendant did not raise a double jeopardy issue below, this issue has not been preserved for appeal. *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). Therefore, our review is limited to plain error affecting defendant's substantial rights. *People v Matuszak*, 263 Mich App 42, 47; 687 NW2d 342 (2004).

The constitutional prohibition against double jeopardy provides three separate protections, one of which is that "it protects against multiple punishments for the same offense." *People v Nutt*, 469 Mich 565, 574; 677 NW2d 1 (2004). The protection against multiple punishments for the same offense "is to protect the defendant from having more punishment imposed than the Legislature intended." *People v Ford*, 262 Mich App 443, 447-448; 687

NW2d 119 (2004). Defendant's argument is based on the social norms test enunciated in *People v Robideau*, 419 Mich 458, 487-488; 355 NW2d 592 (1984). However, in *People v Bobby Smith*, 478 Mich 292, 324; 733 NW2d 351 (2007), the Supreme Court overruled *Robideau* and adopted the same elements test from *Blockburger v United States*, 284 US 299; 52 S Ct 180; 76 L Ed 2d 306 (1932). Because defendant's argument is based on outdated law and defendant has not argued that he was subjected to multiple punishments for the same offense under the current law, he has failed to establish plain error.

In any event, the Supreme Court has held that the Legislature intended to impose multiple punishments whenever a person in possession of a firearm commits any felony other than those four expressly exempted in the statute itself and thus, if the underlying felony is not one of the exempted felonies in the statute, multiple punishments are permitted. *People v Calloway*, 469 Mich 448, 452; 671 NW2d 733 (2003). The four exceptions to the felony-firearm statute are MCL 750.223, MCL 750.227, MCL 750.227a, and MCL 750.230. Because reckless use of a firearm, MCL 752.863a, is not among them, there is no double jeopardy violation.

Defendant next argues that the trial court erred by failing to instruct the jury that reckless use of a firearm is a misdemeanor that cannot support a felony-firearm conviction, and that conviction of felony-firearm requires that the jury find that defendant actually committed a felony. Because defense counsel affirmatively approved the jury instructions, any error has been waived. See *Matuszak*, 263 Mich App at 57. Accordingly, "there is no 'error' to review." *People v Carter*, 462 Mich 206, 219-220; 612 NW2d 144 (2000). Even if we were to treat this issue as an unpreserved issue subject to review for plain error, *People v Hill*, 257 Mich App 126, 151-152; 667 NW2d 78 (2003), appellate relief would not be warranted. The trial court instructed the jury that it could convict defendant of felony-firearm only if the prosecution proved beyond a reasonable doubt "that the defendant committed or attempted to commit the crime of assault with intent to commit great bodily harm less than murder or assault with a dangerous weapon." This Court presumes that a jury follows the trial court's instructions "until the contrary is clearly shown," *People v Wolverton*, 227 Mich App 72, 77; 574 NW2d 703 (1997), and there is nothing in the record to indicate that the jury believed it could convict defendant of felony-firearm based on the commission of reckless use of a firearm. The mere fact that the jury did not convict defendant of assault with intent to do great bodily harm or felonious assault is not determinative because "[j]uries are not held to any rules of logic," *People v Vaughn*, 409 Mich 463, 466; 295 NW2d 354 (1980), and they "may reach *different* conclusions concerning an *identical* element of two different offenses." *People v Goss*, 446 Mich 587, 597; 521 NW2d 312 (1994) (emphasis in original). Thus, "[a] felony-firearm conviction may stand alone if the factfinder, for whatever reason, wishes to acquit the defendant of the underlying felony[.]" *People v Wakeford*, 418 Mich 95, 109 n 13; 341 NW2d 68 (1983). Therefore, defendant has not shown a plain error.

Affirmed.

/s/ Pat M. Donofrio
/s/ Mark J. Cavanagh
/s/ Cynthia Diane Stephens